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IN THE

Supreme Court of the United States

DECEMBER TERM, 1946

No. 297 734

BAKER CASTOR OIL COMPANY,

Petitioner,
(Plaintiff Below),

against

INSURANCE COMPANY OF NORTH AMERICA,

Respondent,
(Defendant Below).

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Dated Nov. 29, 1946.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

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IN THE

Supreme Court of the United States

DECEMBER TERM, 1946

No. 297

BAKER CASTOR OIL COMPANY,

Petitioner,
(Plaintiff Below),

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent,
(Defendant Below).

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of Baker Castor Oil Company respectfully shows to this Honorable Court as follows:

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its decision affirming a decree of the United States District Court for the Southern District of New York.

2. The suit was an assured's action at law against the insurance company defendant to recover under a war risk policy issued by it, certain forwarding expenses made necessary by the action of German submarines off the Atlantic

Coast and the port of New York in the Spring of 1942. The war risk underwriter was relieved from liability and this petition is for a review of this decision.

Statement of Facts

On March 10th, 1942, the voyages of three Brazilian merchant ships*, then en route from Brazilian ports to New York with general cargoes, including several shipments of castor beans belonging to petitioner, were interrupted by order of their owner, the Brazilian Government. The orders were that these vessels, and all other Brazilian vessels, public and private, should put into the nearest safe port, or suspend sailing if in port.

The reason for this order of March 10th was that on March 9th a Brazilian merchant ship, enroute from Brazil to New York, had been sunk by a German submarine following the similar destruction of a Brazilian ship on March 7th and the earlier destruction of other like tonnage, with heavy loss of life, in the unrestricted submarine warfare then being waged by the Germans off the Atlantic Coast of the United States. The imminent danger of destruction of these vessels and cargoes by the warlike operations of the German Government, if they proceeded on their voyages to New York, caused the diversion order of March 10th.

It is emphasized that this destruction of other Brazilian vessels and cargoes by German warships, on March 7th

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* The Lesteloide, Jaboatao and Commandante Pessoa were all owned by Lloyd Brazileiro, the Merchant Marine arm of the Brazilian Government.

and 9th, 1942, occurred after the voyages of the Lesteloide and other two vessels had been commenced, after the cargo insurance policy had attached, and while the policy was in full force and effect.

All Brazilian vessels interrupted their voyages, as thus ordered, and put back into port or remained in port pending the perfecting of safety arrangements for their movement to the United States. After some delay the vessels again departed but they were all diverted, by government orders, to New Orleans instead of proceeding to their destinations at New York. This change, as the record shows (R. p. 95, 301) was ordered for the safety of the vessels, their personnel and cargoes. The shipments destined for New York, therefore, were discharged at New Orleans.

Petitioner, as owner of the castor bean shipments, was obliged to and did ship them from New Orleans to New York by rail, at considerable expense.

The contracts of affreightment for the ocean voyage to New York provided for carriage to that port as the destination, and petitioner prepaid the ocean freight, which, according to the terms of the bills of lading, was earned by the carrier upon loading. The carrier relied upon the "war clauses" in the bill of lading to relieve it from liability for delivery of the cargoes at New Orleans instead of New York, and petitioner was compelled to bear the cost of the forwarding expenses by rail from New Orleans to New York, in addition to payment of the full ocean freight.

Suit was brought to recover the amount of these rail forwarding expenses from the respondent insurance company herein which had issued to petitioner its war risk insurance policy covering these shipments and voyages from Brazil to New York.

The perils insured by these policies included, among others, the risks of "destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations and acts of kings, princes and peoples in prosecution of hostilities * * *, whether before or after declaration of war and whether by a belligerent or otherwise, * * *."

The Circuit Court of Appeals held that although the acts of the shipowner were motivated by the presence of a war peril insured against, they were not, "within the legal concept of cause," the result of that peril. This conclusion was reached upon the theory that, as to the insured peril, "warlike operations", there was no "impact", a new word in shipping and war risk terminology and coined for the decision in question.

"Impact" against what? Need the German submarines have attacked and sunk the vessels and thus have caused the loss and destruction of the insured shipments? Was not the forced diversion from direct carriage to New York by the vessels and delivery at destination by rail after discharge at New Orleans enough?

By using the word "impact" the Circuit Court apparently implied that before insurance could be collected under the war risk claim, the vessels had to be attacked and sunk with loss of the insured shipments. The loss incurred through the forced diversion of the vessels from their original destination, New York, to New Orleans, was not considered to be a loss recoverable under the war risk clause. The resulting expense to petitioner for shipment by rail from New Orleans to New York was held, therefore, to be a loss that petitioner had to bear in spite of the full coverage it had purchased for the insured transit to New York.

The Courts below have not discussed in their opinions, and may not have fully considered, the fundamental distinction between policies of insurance upon ships and policies of insurance upon cargoes. The ship itself is the entire subject matter of a vessel policy. As to insurance on cargo, however, it has been settled since the decision of the House of Lords in *Sanday's* case (*British & Foreign Marine Ins. Co. Ltd.* v. *Samuel Sanday & Co.*, (1916) 1 A.C. 650) that the cargo itself is not the only subject of such insurance; that even though the insured goods are safe, a claim under the policy may be validly based upon loss of the voyage or adventure by reason of a peril insured against; and that there is, therefore, in cargo policies an *additional* insurance of safe transportation to and arrival at the port of destination (*Forestal Land Timber & Railways Co. Ltd.* v. *Rickards* (*The Minden*), (1941) 70 Ll. L. Rep. 174, 180-181; (1942) A.C. 50).

If, therefore, under any legal concept of cause, a direct "impact" of an insured peril against the subject of the insurance be necessary, there was here such an impact against the *insured voyage or adventure,* if not against the cargo itself. The warlike operations of the German Government were the direct and efficient cause of the break in the insured voyages and the diversions to New Orleans with the consequent loss to the petitioner.

Aside from this distinction between the insured goods and the insured voyage, it is respectfully submitted that the Circuit Court of Appeals has departed from settled rules of proximate cause in requiring that there be a direct "impact" of an insured peril, before it can be held the insured peril becomes operative. Many decisions of this Court and of the English Courts have simplified the rules

of proximate cause so that it may now be said that the *efficient* cause of a loss is the proximate cause, and it may be said, furthermore, that causal connection should be considered as the ordinary man would consider it rather than from the viewpoint solely of the last cause in operation just before the loss.

Instead of holding, in effect, that the carrying ship must feel the impact of a German missile before it can legally be said war perils have operated as to the cargo, the Circuit Court of Appeals, the petitioner submits, should have held these expenses recoverable on the theory that they were the necessary result of the insured peril of warlike operations which became operative when the danger of destruction was so imminent and real as to justify interruption of the voyages and diversions of the ships to New Orleans.

The net result of the actions of the various governments was the diversion to New Orleans resulting in a new, unexpected expense falling upon petitioner as owner of the shipments. War risk underwriters, on the other hand, had the danger of a total loss by destruction of the shipments by German submarines successfully averted and, under the decisions of the Courts below, have escaped all liability for the expenses thus incurred. This, petitioner submits, is both unjust and in violation of its insurance contract.

Decisions Below

The District Court held that the underwriter was not liable for the loss because it found the loss was not due to "restraint" by either the Brazilian Government or the United States, that the orders for the diversions to New

Orleans were not those of a "sovereign" but of a "prudent shipowner." The Court differentiated between the acts of the Lloyd Brasileiro as operator of the vessels and those of the Brazilian Government as owner. A similar distinction was made between the acts of the United States and those of the War Shipping Administration.

The District Court did not pass upon the question of whether the loss fell within the peril of "warlike operations" of the German Government or as due to "acts" of the Brazilian or United States Governments "in the prosecution of hostilities * * * before or after the outbreak of war."

The Circuit Court of Appeals held the loss was not due to "restraints" of either the Brazilian or the United States Governments and reached the conclusion that the war risk underwriter was not liable for the loss as caused by "warlike operations" because it held there had been no actual "impact" between the "warlike operations" then existing and the insured merchandise. No distinction was drawn by the Circuit Court, as stated above, between "impact" causing the necessity of the vessels being diverted from New York to New Orleans and "impact" resulting in physical destruction of the merchandise.

Questions Presented

1. Did this policy on cargo insure not only the goods themselves, but also the voyages or adventures to New York?

2. Were the warlike operations of the German Government insured perils which became operative and proximately caused the interruption of the voyages,

the diversions to New Orleans and the expenses for which this suit was brought?

3. Are expenses reasonably incurred to avoid destruction of the cargoes by insured perils recoverable under this policy and the circumstances of this case?

4. If warlike operations of the German Government did not proximately cause these losses, were they proximately caused by "restraints" and "warlike operations" or "acts" of Brazil or the United States, or both?

Reasons Relied on for the Allowance of the Writ

The petitioner respectfully submits that this Honorable Court should exercise its power to take up this cause on certiorari for the following reasons:

(1) Because the case involves questions of marine insurance law which are of national and international importance.

(2) Because the rules of law applicable to the facts in this case and in many other similar cases and claims now pending have not been, but should be, settled by this Honorable Court.

(3) Because, in respect of the subject matter of cargo insurance policies and the rules of proximate cause thereto applicable, the Circuit Court of Appeals here has decided the issues in this case in conflict with decisions of this Court, that of other Circuit Courts of Appeal, and of the English Courts.

(4) Because the courts below, in deciding the cause on inferences and contrary to the evidence, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(5) The questions raised by this petition are of great importance to the United States as a war risk underwriter, to other private war risk underwriters, to individuals and representatives of deceased seamen interested in war risk claims, and to shippers of merchandise and commercial interests in general, and, it is respectfully submitted that these questions should be settled by this Court.

The war risk insurance policies in this case, adapted to meet modern conditions and modern warfare, are broader in coverage than most, if not all, the war risk policies that were issued before this war began, because of the addition of the words "warlike operations and acts" in the insured perils clause. Because of these added terms there are many unsettled questions in regard to their interpretation and the breadth of the coverage afforded by the war risk clause used during World War II.

As to the general importance of the issues, the pendency of other cases and claims which will be affected by the ultimate decision of this case, the following is quoted from the brief of the United States which intervened, by permission of the Court, as *amicus curiae* in the appeal taken herein to the Circuit Court of Appeals:

> "The United States is interested in this proceeding because it has issued policies of war risk insurance substantially identical with the policy in suit and a number of claims have been made against

it similar to that asserted here. Suit has been brought against the Government upon one such claim entitled 'Spencer Kellogg & Co., Inc., Libelant v. United States of America, Respondent', and is now pending in the Western District of New York. The Libelant in that case is represented by the same counsel as is the appellant in this case and the decision rendered on this appeal may be dispositive of that case and of the rights of other assureds under government war risks policies whose claims are not in litigation.

"The case raises broad issues, first, whether instructions or arrangements given or effected by War Shipping Administration, pursuant to its powers to allocate shipping facilities and its insurance powers, can constitute a restraint within the meaning of modern war risk insurance policies; and, secondly, whether extraordinary expense incurred in complying with safety regulations governing vessel traffic into our ports constitutes a loss due to warlike operation within the meaning of such policies."

In respect of the vital issue of proximate cause, the decision of the Circuit Court of Appeals, we submit, is contrary to the doctrine laid down by this Court in the recent case of *Lanasa Fruit Steamship & Importing, Co., Inc.* v. *Universal Insurance Co.* (*The Smaragd*), (1938) 302 U. S. 556, and by the House of Lords in the case of *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Soc.*, (1918) A.C. 350:

"It is true that the doctrine of proximate causation is applied strictly in cases of marine insurance. *But in that class of cases, as well as in others, the proximate causes is the efficient causes and not a merely incidental cause which may be nearer in time to the result.*"

These broadened war risk policies were written during World War II not only by private war risk underwriters, such as the defendant herein, but were also written by the United States on both cargoes and on lives. In two cases in the Federal District Court in Philadelphia involving seamen the war risk clause, in war risk policies issued by the War Shipping Administration, was given a very wide interpretation and the United States, as the war risk underwriter, was held liable in each case. In one, that of *Christ* v. *United States,* 1946 M.C. 170, the United States has appealed seeking reversal, by the Third Circuit Court of Appeals, of liability predicated upon a broad interpretation of the terms "warlike operations" and "restraint." In the other case, to add to the confusion regarding the law regarding "warlike operations," no appeal was taken. This case is entitled *Murphy* v. *United States,* 1946 M.C. 378.

In the Circuit Court of Appeals the United States, in the case at bar (Brief, p. 16), made the following statement regarding the added coverage against "warlike operations":

> "The phrase 'consequences of warlike operations in the prosecution of hostilities' does not, as appellant attempts to imply, broaden the insurance coverage to include every item of expense incurred because the enemy is using submarines. The phrase has been carefully considered and defined by the Courts, and when marine underwriters, including the United States pursuant to Sections 221, et seq., of the Merchant Marine Act, issued war risk policies the limits of the phrase were well defined."

While problems incident to war and marine insurance have been litigated during World War II rather freely in England, the same can not be said in this country where, due to the necessity of naval security, claims and cases have accumulated waiting for the release of facts with Navy permission. Such testimony is now being released and cases are now being litigated. Accordingly an early decision by the Supreme Court, interpreting the new policy form and defining the extent of the insurance coverage comprehended by the term "warlike operations," is urgently required by shipping and insurance interests.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court, for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the case which is entitled in the Circuit Court: Baker Castor Oil Company, Appellant vs. Insurance Company of North America, Appellee, and that said decree of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, as herein prayed for, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may see just and proper, and your petitioner will ever pray.

BAKER CASTOR OIL COMPANY,
Petitioner,

By Forrest E. Single,
Counsel for Petitioner.

Dated November 29, 1946.

IN THE

Supreme Court of the United States

DECEMBER TERM, 1946

No. 297

BAKER CASTOR OIL COMPANY,

Petitioner,
(Plaintiff Below),

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent,
(Defendant Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York, dated December 30, 1944, is reported in 60 Fed. Supp. 32, 1945 M.C. 168, and 78 Ll. L. Rep. 240 and is printed at pages 310-321 of the record. The opinion of the Circuit Court of Appeals for the Second Circuit, dated August 5, 1946, is reported in 1946 M.C. 1115 and also appears at pages 390-394 of the record.

II.

Jurisdiction

1. Upon the filing of the opinion of the Circuit Court of Appeals affirming the judgment of the District Court a petition for rehearing was filed. This petition was denied September 6, 1946 (R. p. 426). Judgment was entered thereon. The date of the judgment of the United States Circuit Court of Appeals to be reviewed is September 6, 1946 (R. p. 426).

2. The specific rulings of the Circuit Court of Appeals which are relied upon as the basis of this Court's jurisdiction are set forth in the petition herein under the heading "Reasons Relied on for the Allowance of the Writ" (*supra,* pp. 8-12) and for brevity's sake will not be repeated here.

3. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938; Title 28 U. S. Code, Sec. 349).

III.

Statement of Facts

A full statement of the case has been given under the heading "Statement of Facts" in the petition (*supra,* pp. 2-6) and for brevity's sake will not be repeated here.

IV.

Specifications of Error

The errors of the Circuit Court of Appeals which are urged by the petitioner are set forth in the petition herein under the heading "Reasons Relied on for the Allowance of the Writ" (*supra*, pp. 8-12) and for brevity's sake will not be repeated here.

V.

Summary of the Argument

A. This policy on cargo insured not only the goods themselves but also the voyages or adventures to New York.

B. The warlike operations of the German Government were insured perils which became operative and proximately caused the interruption of the voyages, the diversions to New Orleans and the expenses for which this suit was brought.

C. Expenses reasonably incurred to avoid destruction of the cargoes by insured perils are recoverable under this policy and the circumstances of this case.

D. Even if the Circuit Court of Appeals below was correct in holding that these losses were not proximately caused by warlike operations of the German Government this Court, nevertheless, should have held that the losses were proximately caused by "restraints" and "warlike operations" of Brazil or the United States, or both.

E. The Courts below erred in holding that the orders to seek port for safety from the German submarine menace

and the later diversions to New Orleans, with discharge of cargoes there, were shipowning orders of the Lloyd Brazileiro rather than sovereign orders of the Brazilian Government. The same error was made in holding that the orders of the War Shipping Administration, acting for the United States, were made in its capacity as a shipowner rather than as a sovereign.

VI.

Argument

POINT A

This policy on cargo insured not only the goods themselves but also the voyages or adventures to New York.

The rule applicable is clearly stated in the decision of the House of Lords in *Forestal Land Timber and Railways Co., Ltd.* v. *Rickards* (*The Minden*), (1941) 70 Ll. L. Rep. 174, 180-181, (1942) A.C. 50:

> "When goods are insured under a voyage policy, the subject-matter of the contract is of course the goods engaged in the adventure. The loss of the goods on the voyage gives rise to a valid claim. But since the decision in this House in British & Foreign Marine Insurance Company, Ltd. v. Samuel Sanday & Co., (1916) 1 A. C. 650, it has been finally settled that, even though the insured goods are safe, a claim under the policy may be validly based upon loss of the adventure by reason of a peril insured against. Lord Justice MacKinnon puts the matter most clearly thus (68 Ll. L. Rep. at p. 64):

'The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils. But even if the goods are not so lost or damaged, there is an additional insurance against the loss of their voyage. The learned Judge considers this to be not an additional risk, but an essential part of it in every case, whereas the two quotations from Mr. Lord Justice Bray and Lord Reading, Lord Chief Justice, which he cites just afterwards both make it clear that this is only an additional risk. Mr. Justice Bray says (Sanday's case, (1915) 2 K. B. 781, at p. 832): "It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured." And Lord Reading uses almost identical words.' "

POINT B

The warlike operations of the German Government were insured perils which became operative and proximately caused the interruption of the voyages, the diversions to New Orleans and the expenses for which this suit was brought.

During the period between World War I and World War II, the perils clause involved in the present action was drawn up by underwriters. All the risks covered before are to be found in the new policy and the insurance was extended by the addition of the peril of "other warlike operations" as a part of the new clause. We have italicized, in reprinting here Clause I in the policy in suit, the perils added to the old war risk form.

"This insurance is only against the risks of capture, seizure, destruction or damage by men of war,

> *piracy*, takings at sea, arrests, restraints and detainments *and other warlike operations* and acts of kings, princes and peoples in prosecution of hostilities *or in the application of sanctions under international agreements, whether before or after declaration of war* and whether by a belligerent or *otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationery mines and stray or derelict torpedoes.*"

The coverage thus afforded against "other warlike operations", followed, as it is, by "acts of kings, princes and peoples in the prosecution of hostilities", we consider of the widest scope. This broad all-inclusive added provision extends the policy, we submit, far beyond the policies involved in the litigation following World War I, both in England and the United States.

"General words following an enumeration of particular things may include other things not *ejusdem generis*, if such appears to have been the intention of the parties." See *Williston on Contracts* (Rev. Ed.), Vol. 3, Sec. 619; *Associated M. & M. Corp.* v. *Swedish Line Ltd.*, 1942 M.C. 1528, 1537.

The basic issues involved in this appeal, in respect to the construction of the above war risk insurance clause, are of considerable general importance. Since World War I, as stated, the insured perils clause has been materially enlarged, not only in the war risk policies issued by the private underwriters, but also in the war risk insurance policies issued by the United States Government, covering lives as well as property. Numerous claims are now in suit.

Only a few of them have been tried. Many have been stayed at the request of the Government, pending the release of information formerly kept secret under Navy rules as a measure of wartime security.

Undoubtedly submarine activity and other acts of the German Government, in waging modern "total" war, including psychological warfare, come within the term "warlike operations".

The question of causal connection between these "warlike operations and acts" of the Germans and the loss should be determined in the light of the decisions of this Court and the later decisions of the English Courts, and, it is submitted, that the Circuit Court of Appeals here has not done so.

Willard Phillips says in his Treatise on the Law of Insurance, 5th Ed. (1867), Vol. I, Sec. 1132, p. 677:

> "I understand the results of the jurisprudence to be that:
>
> > *In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster.*" (Italics by the author.)

The interpretation of this leading American jurist is in line with the practically constant trend of the American authorities from *Peters* v. *The Warren Ins., Co.,* (1840) 14 Pet. 99, 1 Stor, C.C. 463, to the *Lanasa* case, *supra,* p. 10. The English decisions were formerly inclined otherwise, and, during the latter half of the last century, leaned towards what might be called the narrow construction of the theory of proximate cause, viz. that it is the immediate cause, the very last one in order of time; and the judgment

of the House of Lords in *Dudgeon* v. *Pembroke,* L. R. 9 Q.B. 220, (1877) 2 A.C. 284, and that of the Court of Appeal in *Pink* v. *Fleming,* (1890) 25 Q.B.D. 396, 6 Asp. M.C. 554, are in that direction. However, it was soon noticed—in the words of Lord Selborne in *Inman SS. Co.* v. *Bischoff,* (1882) 5 Asp. M.C. 6,—that "a too literal application of the doctrine would work injustice and would not really be justified by the principle itself," and that the doctrine had to be applied with due regard to equity, or it would create absurdities and thus defeat both justice and the intention of the contracting parties.

The narrow view was gradually broadened in England. In *Reischer* v. *Borwick,* (1894) 2 Q.B. 548, we find the first reaction against it. *Becker, Gray & Co.* v. *London Ass. Corpn.,* (1918) A.C. 101, is the last example of the literal interpretation or the narrow construction. The same year this case was decided the House of Lords decided the case of *Leyland Shipping Co., supra* (p. 10); and this, together with *Samuel* v. *Dumas,* (1924) A.C. 431, represents a clear and unequivocal acceptance of Phillips' interpretation of the proximate cause doctrine, and the ending of conflict between English and American jurisprudence on the subject.

The cycle is closed by the House of Lords decision in *Yorkshire Dale SS. Co. Ltd.* v. *Ministry of War Transport* (*The Coxwold*), (1942) A.C. 691, 73 Ll. L. Rep. 1. Said Lord Wright in that case:

> "* * * Once it is clear, as this House finally held in Leyland Shipping Co. v. Norwich Union Fire Ins. Society, (1918) A. C. 350, that 'proximate' here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among cooperating causes in order to

find what is the proximate cause in the particular case. In the words of *Phillips* on Insurance, 5th Ed. 1867, Cambridge (Mass.), Vol. I, Sec. 1132, p. 678:

> 'In the case of concurrence of different causes to one of which it is necessary (sc. because of the nature of the contract) to attribute the loss, it is to be attributed to the efficient predominating peril whether it is or is not in activity at the consummation of the disaster.'
>
> "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too miscroscopic analysis but on a broad view * * *."

The acceptance of the broad construction, predicated on simple common sense standards, also appears from the decision of the Supreme Court in the *Lanasa Fruit* case, *supra* (p. 10). There this Court said, at page 562:

> "The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. Ins. Co. v. Boon, 95 U. S. 117, 130; Arnould on Ins., 11th Ed. #783."

This Court then referred to the decision of the House of Lords in *Leyland Shipping Co., supra,* and quoted at length therefrom.

The simple truth of the case at bar is that the dominating cause of the diversion of the ships and cargoes here involved was not just the threat of the Germans to sink Brazilian ships but the acts of the Germans in actually destroying them. The first diversion order involving the Lesteloide and the other ships followed immediately upon the March 9th sinking of a Brazilian vessel, two days after a like sinking on March 7th. The vessels here involved sought refuge on March 10th for immediate safety and, in furtherance of these safety precautions, when the voyages to the United States were resumed the destination was changed to New Orleans from New York to escape the submarines which in the spring and summer of 1942 were lurking off the latter port. It was this German submarine peril, added to the "restraints" and "acts" of both the Brazilian and the United States Governments, that caused the losses here in suit.

The Circuit Court, in addition to its citation of *The Kronprinzessin Cecilie,* (1917) 244 U. S. 12,* regarding "impact," a most inapplicable citation on its facts, cited the case of *Nickels & Co.* v. *London & Prov. Mar. & Gen. Ins. Co. Ltd.,* 6 C.C. 15. This case does tend to sustain the Circuit Court's decision. However, it is, we submit, clearly distinguishable on the grounds, among other possible grounds, that it was decided around 1900, before it had become settled English law that the voyage or adventure was an additional subject of insurance in a marine policy of insurance on cargo.

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* The docket title of this case is: North German Lloyd, claimant of the Steamship "Kronprinzessin Cecilie," Petitioner v. Guaranty Trust Company of New York and National City Bank of New York.

POINT C

Expenses reasonably incurred to avoid destruction of the cargoes by insured perils are recoverable under this policy and the circumstances of this case.

In support of the statement of the Circuit Court of Appeals that there must be an "impact" of the peril upon the subject matter insured, the first opinion reference is to *The Kronprinzessin Cecilie* case, (1917) 244 U. S. 12. In that case, the nearest point of possible "impact" was 1070 nautical miles away. This hazard which was of British capture, this German vessel avoided by deviating to Bar Harbor, a step which this Court held was properly taken in view of the danger ahead which the Kronprinzessin Cecilie would have encountered had she continued on her voyage. The danger of "impact" in the case at bar, as petitioner offered to specifically prove (Petitioner for Rehearing, R. p. 425), was much less.

The law of *The Kronprinzessin Cecilie* case now is recognized English Law also. This fact became clearly evident in the decision in the *Coxwold* case, *supra* (p. 20), as is evidenced by Lord Porter's remarks, in referring to the *Coxwold* and other cases in an address before the English Association of Average Adjusters, as follows:

> "I think the ordinary man, if asked what caused the casualty, would reply that it was caused by *the vessel, in obedience to orders from the commander of the convoy, deviating from a safe course in order to avoid a suspected enemy submarine.*"

Similarly in the *Wildwood* case, *American Foreign SS. Corp.* v. *Amtorg Trading Corp.* (9 CCA, 1943), (reversing

DC. WD of Wash.), 133 F. (2d) 765, the only question involved was the hazard of capture, and there was no "impact" as such at all and yet the vessel's diversion was excused as due to a war peril.

How much stronger was the necessity for turning back in the case at bar where the decision was made only after three Brazilian vessels had been sunk without warning and with serious loss of life and where, as far as the United States was concerned, the tragic toll of lives and the loss of vessels and cargoes totalled several score! There can be no question but that, if these vessels had not been ordered to await convoy and then to proceed to New Orleans instead of to New York, the crews would have been in imminent peril of death and the ships and cargoes of destruction. Further progress was so fraught with serious risk from the submarine warfare then existing that losses arising from steps taken to avoid this peril, under the law, were losses caused by the peril thus avoided, therefore losses within the scope and purview of the war risk policy here in suit. The hazard thus avoided, furthermore, was of physical destruction of the vessel by submarines, a hazard far different from that which formed the basis for the deviation in the *Kronprinzessin Cecilie* or *Wildwood* cases, and hence more clearly covered by insurance against the war peril thus avoided.

In the two last mentioned cases the hazard was of capture alone. Such a danger should be carefully differentiated from the hazard of destruction by torpedoes faced by the three vessels here involved. This distinction was pointed by Judge Augustus N. Hand in the unreported case of *David C. Mitchell* v. *The Seguranca SS. Corp.*, (DC,

SDNY) a case involving the abandonment of a voyage during World War I for financial rather than peril reasons. There Judge Hand said:

> "I think the hostilities which might make it unsafe or imprudent for the vessel to sail were war risks of physical destruction of the vessel, and not mere detention or subjection to condemnation in a prize court."

In the case at bar the three Brazilian vessels were unarmed when these cargoes were loaded and when they started on their voyages to New York and when this hazard of destruction by German submarines supervened. The vessels were in no way prepared or equipped to defend themselves from submarine attack. The steps later taken to circumvent and avoid the risk resulting from the inauguration and prosecution by Germany of unrestricted warfare off the port of New York, were taken because of the "imminency of such perils," and are, therefore to be considered as proximately caused by those perils. Losses flowing from the steps thus taken, after the insured voyages had begun, we submit, under the authorities, are recoverable from the insurer whose policies protect against these perils. See Phillips on Insurance, 5th Ed., Vol. 1, Sec. 1115, page 655.

The rule of law as declared by Mr. Justice Holmes in *The Kronprinzessin Cecilie* case, *supra,* recognizing the right of the carrier to avoid proceeding into the jaws of danger, was also the rule laid down in the case of *Steamship Stryia* v. *Morgan,* (1901) 186 U. S. 1, and in the leading English case of *Nobel's Explosives Co.* v. *Jenkins & Co.,* (1896) 2 Q.B. 326; 65 L.J.Q.B. 638; 8 Asp. M.C. (N. S.) 181.

The principles and standards which we contend are applicable here are not only set forth in the above decisions but have been repeatedly applied. See also the following cases:

British Iron & Steel Corp., Ltd. v. *Goulandris Bros.* (SS. George J. Goulandris), 36 F. Supp. 827, 834 (DC, Maine);

American Foreign SS. Corp. v. *Amtorg Trading Corp.* (The Wildwood), (9 CCA, 1943), (reversing DC, WD of Wash.), 133 F. (2d) 765;

Atlantic Fruit Co. v. *Solari* (DC, SDNY, 1916), 238 Fed. 217, 224;

M. A. Quina Export Co. v. *Seebold* (5 CCA, 1923), 287 Fed. 626;

Israel v. *Luckenbach SS. Co.* (2 CCA, 1925), 6 F. (2d) 996, 997-998, 999-1000;

Compagnie de Trefileries v. *F. & C. S. S. Co., Ltd.,* (1920) 192 App. Div. 709, affirmed 223 N. Y. 596;

and in England:

In re An Arbitration between Tonnevold and Finn Friis, (1916) 2 K. B. 55.

See also re "the widest discretion to deviate for any reason connected with the war", the decision of Judge Learned Hand in 1922 in *The Blandon* (DC, SDNY), 287 Fed. 722, 724.

In *The Kronprinzessin Cecilie* case, *supra,* Mr. Justice Holmes stated that although cases deciding what is or what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in construing the rights of shippers under contracts of affreightment, that, nevertheless, he saw no ground to doubt

that the result reached there would have been concurred in, as to insurance matters, by Chief Justice Marshall and Chief Justice Kent and in that case, of course, as mentioned above, there was no "impact," but the danger was at least one thousand miles away.

Mr. Justice Holmes then referred to a number of early American authorities, including the case of *Craig* v. *United Insurance Company,* (1810) 6 Johns. 226, 250, 253, a decision by Chancellor Kent on an insurance question. The language used in the *Craig* case, thus approved, is squarely in point upon the issue before this Court. Chancellor Kent said:

> "It is as unlawful to rush into the arms of an *enemy,* with your property, as it is to break a blockade, or force an entry into a port, when an entry is prohibited by the sovereign of such port. There may be doubts as to the *terminus a quo,* or from what point the voyage is to be abandoned, and what species of demonstration of the danger, the assured ought to require. But assuming the fact of the existence of such an impediment, and of the reasonable certainty that it would be made effectual, to the loss of the subject insured, the assured is justified in giving up the voyage and calling on the insurer to indemnify. It amounts to a loss of the voyage." (p. 253)

That the rule in England is the same, see *Miller* v. *Law Accident Ins. Co.,* (1902) 2 K.B. 694, 697, where the following appears in the discussion preceding the Court's decision:

> "No doubt where a peril within the meaning of the policy is imminent, the assured may incur expense to avoid it; * * *."

"'A just fear' says Targa, 'is a kind of violence'", *Schmidt* v. *The United Ins. Co.*, 1 Johns. Rep. (N.Y.) 249, 262.

We submit that there need be no "impact," as found by the Circuit Court of Appeals, if the danger is real and imminent and certainly here the danger was far more real and far more imminent than was the danger in the *Kronprinzessin Cecilie* case while that vessel was still over a thousand miles from England.

POINT D

Even if the Circuit Court of Appeals below was correct in holding that these losses were not proximately caused by warlike operations of the German Government this Court, nevertheless, should have held that the losses were proximately caused by "restraints" and "warlike operations" of Brazil or the United States or both.

The trial Court, as the Circuit Court of Appeals stated in its opinion (R. p. 393), found that the orders of Lloyd Brazileiro, directing the movement of the vessels involved in this case, were confined to its own vessels and that they were given as a private owner, not a sovereign. The Circuit Court of Appeals made its decision upon that theory.

The case was tried in November 1944 under wartime conditions and security limitations as to the production of evidence regarding shipping and war activities.

In the Circuit Court of Appeals, petitioner made application, upon full affidavits, for permission to adduce proof, now available, which, it submits, would have conclusively

shown that the orders to interrupt the voyages, put in at the nearest safe ports, await convoys, and, finally, to divert the ships to New Orleans, were all given by the Brazilian Government, as a result of negotiations and understandings between that government and the United States, worked out through conferences with the United States Navy (R. p. 422). These orders, furthermore, applied to all Brazilian vessels.

If, therefore, it be a determinative or material issue in this case as to whether the orders were given by the Brazilian Government in its sovereign capacity, and thus constituted "restraints", petitioner submits it should have been granted permission to make such proof, including full proof as to the nature of the directions and orders given by the United States Navy Officials.*

The District Court considered that the "essential" question for determination was whether the facts constituted sovereign restraints within the coverage of the policy (R. p. 321). The Circuit Court of Appeals stated that the District Court had correctly held there were no acts by either the Government of Brazil or of the United States constituting sovereign restraints.

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* It might be pointed out to the Court that in the *Spencer Kellogg* case, referred to in the Petition and Brief of the United States as *amicus curiae*, the pleadings showed the order diverting those vessels from their voyages to New York to New Orleans were orders of the Argentine Government, applicable to all Argentine vessels, and, therefore, it may tend to avoid considerable further litigation in the Spencer Kellogg and other cases, if the Supreme Court should hear and settle the issues presented by the present case, including the question of whether it is a material or immaterial fact that the diversion orders were issued by their respective governments as sovereigns, or in their capacity only as operators and owners of merchant vessels.

In both of the lower Courts, these conclusions of law were, of course, based upon their construction of the law and the evidence at the trial and not upon the full statement of facts which the petitioner had offered to produce, after the end of war controls.

POINT E

The Courts below erred in holding that the orders to seek port for safety from the German submarine menace and the later diversions to New Orleans, with discharge of cargoes there, were shipowning orders of the Lloyd Brazileiro rather than sovereign orders of the Brazilian Government. The same error was made in holding that the orders of the War Shipping Administration, acting for the United States, were made in its capacity as a shipowner rather than as a sovereign.

Uncontradicted testimony established that the initial orders to seek port for safety reasons were issued to all Brazilian vessels by the Brazilian Government (R. pp. 200, 226, 230). Nevertheless the District Court drew the inference that the order was that of the ship operating arm of the Brazilian Government and, as such, a matter of ordinary "shipowner practice" and hence held that this action did not fall within the "restraint" provision of the war risk insurance policy. Petitioner had urged and still urges that the action taken by both governments, in part through their shipping departments, were acts of restraint against the shipments and interests of petitioner in respect to cargoes then at sea en route to named and insured destinations and, hence, squarely within the definition of this peril as

best exemplified in the language of the English Marine Insurance Act of 1906, Section 10 of the Rules for Construction of Policy, which reads as follows:

> "The term 'arrests, etc. of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process." (Arnould on Marine Insurance, Eleventh Edition, Volume II, page 1701.)

In this finding the District Court and the Circuit Court of Appeals, without cause, actual or expressed, ignored or discarded:

> (a) The uncontradicted testimony of Mr. Renato de Azevedo, United States representative of the Merchant Marine Commission of Brazil that the orders given were those of the Brazilian Government (R. fols. 676, 679, 690, 730, 731).
>
> (b) The uncontradicted statement of the Lloyd Brazileiro, itself, that its vessels were ordered into New Orleans by the Brazilian Government (R. fols. 572, 599, 845).
>
> (c) The uncontradicted testimony of Archibald E. King, who acted as director of traffic of the War Shipping Administration in Washington in the spring of 1942, who stated that the diversion orders to New Orleans were given by him after conferences between the War Shipping Administration and the United States Navy which followed conferences previously held between the Brazilian Naval Attache and the United States Navy Department (R. fols. 251, 254, 263, 264, 283, 285, 286).

The decisions of the Courts below were based on a mere inference and were against the ascertained and established

facts and, therefore, were contrary to the rules of evidence and general law.

As this Court said in *Lincoln* v. *French*, 105 U. S. 614, 617:

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When they appear, presumptions disappear".

In thus deciding these causes on inference, contrary to the evidence, the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings. This was more than a mere error in the hearing of an appeal; it was a deprivation of rights which though accomplished under the form of legal procedure, was contrary to established rules and principles of law.

CONCLUSION

It is respectfully submitted, that this petition should be granted so that the law in these matters may be well established and made certain, and that the questions here involved, which are of such great importance as to merit the consideration of this Honorable Court, may be reviewed, and the decree of the Circuit Court of Appeals reversed.

Respectfully submitted,

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